SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1970
No. 1600

COMPANIA DE NAVEGACIONE ALMIRANTE S.A., PANAMA, a Panamanian corporation,

Petitioner,

vs.

BEVERLY HILLS NATIONAL BANK, a National Banking Association,

Respondent.

Brief of Respondent in Opposition to Petition for a Writ of Certiorari

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vs.

BEVERLY HILLS NATIONAL BANK, a National Banking Association,

Respondent.

Brief of Respondent in Opposition to Petition for a Writ of Certiorari.

Opinions Below.

The opinion of the Court of Appeals for the Ninth Circuit, as modified on denial of rehearing, (Petition, Appendices A and B) is reported at 437 F. 2d 301. The opinion of the District Court (Petition, Appendix C) is reported at 288 F. Supp. 77.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition.

Restatement of the Questions Presented.

1. Is a shipowner's possessory lien upon cargo for unpaid charter hire lost upon surrender of the cargo?

2. Assuming that a shipowner has a non-possessory lien upon freights earned by a vessel under charter, is that lien lost if the freights are prepaid prior to appropriate assertion of the lien?

3. Can one of two creditors of a common debtor assert a constructive trust upon funds paid to the other creditor in the absence of findings of fraud, undue influence, unjust enrichment or any other of the grounds historically required for the granting of equitable relief?

Supplement to Statement of the Case.

Both Petitioner and Respondent Beverly Hills National Bank are creditors of a common debtor, Kenray, Inc. Petitioner's claim is for unpaid charter hire, while Respondent's is for monies loaned. The issues were whether Petitioner could assert a maritime lien upon certain funds paid by Kenray to Respondent and applied on the debt admittedly owed to Respondent, and whether in the absence of a maritime lien, Petitioner could assert an equitable claim based upon a theory of constructive trust.

The Court of Appeals rejected both of Petitioner's theories. On the issues of maritime lien the Court held —in accordance with numerous prior decisions—that the shipowner's possessory lien on cargo had been lost by surrender of the cargo and that any maritime lien on freights had failed by payment of the freights prior to assertion of the lien. Contrary to Petitioner's arguments (Petition, pp. 7-8) the holding of the Court of Appeals on the maritime issues was neither novel nor did it extend a rule theretofore limited to holders of negotiable bills of lading.

On the issue of constructive trust, Respondent Bank argued below that the Court, sitting in admiralty, had no jurisdiction to consider what was purely an equitable claim. The Court of Appeals rejected Respondent's jurisdictional argument and ruled—in Petitioner's favor—that while there was no admiralty jurisdiction to consider an independent equitable claim, the constructive trust claim could be asserted and considered upon either a theory of "pendent" or diversity jurisdiction.[1] The Court of Appeals then went to the merits of Petitioner's constructive trust claim and concluded —based upon hornbook equity law—that the findings of fact made by the trial court did not sustain the imposition of a constructive trust. In so holding the Court of Appeals did not—as Petitioner asserts (Petition, p. 11)—reweigh factual determinations; rather the Court of Appeals exercised customary appellate standards in determining whether the trial court's findings sustained the legal conclusion which it reached.

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[1]On the application of pendent jurisdiction the Court of Appeals relied upon the decision of this Court in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

ARGUMENT.

The issues in the present case are indeed narrow and episodic. They relate entirely to the efforts of two creditors to obtain payment from a common insolvent debtor. Despite ingenious—but nevertheless distorted—arguments by Petitioner, the decision of the Court of Appeals is not in conflict with other decisions of this Court or other Courts of Appeals nor is it of such significance to warrant review by this Court on certiorari.

I.

In Rejecting the Asserted Maritime Lien the Court of Appeals Applied Established Principles of Admiralty Law.

A. A Shipowner's Lien Upon Cargo Is Possessory in Nature. It Is Lost Upon Surrender of the Cargo.

A shipowner has a possessory lien upon cargo which —unless waived—entitles him to retain the cargo until the freight due has been paid. The lien, being possessory in nature, is lost upon unconditional surrender of the cargo [*e.g., 4885 Bags of Linseed,* 66 U.S. 108, 113 (1861); *The Bird of Paradise,* 72 U.S. 545, 555-556 (1886); *Cutler v. Rae,* 48 U.S. 374, 376 (1848); Gilmore & Black, *The Law of Admiralty,* (1957) pp. 165-66].

Petitioner's assertion, (Petition, p. 7) that the Court of Appeals' decision conflicts with the decision in *The Bird of Paradise, supra,* 72 U.S. 545, cannot be sustained. *The Bird of Pardise* confirms the accepted rule—recognized here by the Court of Appeals—that the shipowner's lien on cargo is possessory in nature and is lost upon unconditional surrender of the cargo.[2]

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[2]This Court said: "Although the lien is maritime and cognizable in the admiralty, yet it stands upon the same ground with

In *The Bird of Paradise* the shipowner had not made an unconditional surrender of the cargo and had asserted a lien upon the cargo for unpaid charter hire. The issue there was whether the shipowner's lien had been waived by accepting credit arrangements for the payment of the charter hire. This Court held that there had been a partial waiver and that no lien on cargo could be asserted for that portion of the freight charges which were not payable until a date following discharge.

Petitioner argues that a release of cargo after security had been arranged is not an unconditional release so as to discharge the shipowner's lien. But such security arrangements must be consensual [See: *N. H. Shipping Corp. v. Freights of the S.S. Jackie Hause,* 181 F. Supp. 165, 171 (S.D.N.Y. 1960)] and no such consensual arrangements were made here.[3]

B. Any Lien on Freights Was Discharged by Payment of the Freights Prior to Assertion of the Lien.

Petitioner argued below that it had a non-possessory lien upon the freights and sub-freights earned by the cargo and that the attached funds included such freights. Those funds, however, had been paid to Re-

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the lien of the carrier on land, and arises from the right of the ship-owner to retain the possession of the goods until the freight is paid, and is lost by an unconditional delivery to the consignee." (72 U.S. at 555).

[3]The record is undisputed that no security was posted for charter hire as it was for general average. Petitioner argued below that the levying of an attachment on Respondent under former General Admiralty Rule 37 (now Supplemental Rule C(3) of the Federal Rules of Civil Procedure) was the equivalent of a consensual posting of security. The argument is specious. A unilateral attachment is not the equivalent of a bilateral posting of security in lieu of cargo. If an attachment were equivalent to the posting of security, the whole concept of *possessory* liens and the necessity for retaining possession could be avoided by the unilateral exercise of a provisional remedy.

spondent prior to the assertion of any lien and the Court of Appeals properly concluded that the lien had been discharged, in accordance with numerous authorities that a shipowner's lien on freights is lost if the funds are paid prior to assertion of the lien [*Marine Traders Inc. v. Seasons Navigation Corp.*, 422 F. 2d 804, 806-07 (2d Cir. 1970); *Oceanic Trading Corp. v. Freights, Sub-Freights and Demurrage of the Vessel Diana*, 423 F. 2d 1, 5-6 (2d Cir. 1970); *Ariate Compania Naviera v. Commonwealth Tankship Owners, Ltd.*, 310 F. Supp. 416, 422 (S.D.N.Y. 1970); *In re North Atlantic & Gulf Steamship Co.*, 204 F. Supp. 899, 904 (S.D.N.Y. 1962), *Aff'd Sub Nom Schilling v. A/S D/S Dannebrog*, 320 F. 2d 628 (2d Cir. 1963); Gilmore & Black, *Op. Cit.* p. 208, note 129 and cases collected; Stephens, *Freight*, p. 200 (1907); Poor, *Charter Parties and Ocean Bills of Lading* (1968 ed.), § 16 at p. 51].[4]

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[4]Since the Court of Appeals decided that any lien that Petitioner may have had on freights had been discharged by prepayment of the freights, the Court was nor required to decide whether Petitioner had such a lien in the first instance. A lien on freights (unlike the shipowner's possessory lien on cargo) exists only by reason of an express grant in the charter agreement. Such grant was absent here. [See: *Oceanic Trading Corp. v. Freights, Sub-Freights and Demurrage of Vessal Diana, supra*, 423 F. 2d 1 at 5; *In re North Atlantic & Gulf Steamship Co., supra*, 204 F. Supp. 899, at 904 and 906; *Ocean Cargo Lines v. North Atlantic Marine Co.*, 227 F. Supp. 872, 880 (S.D.N.Y. 1964); *Hall Corp. v. Cargo ex Steamer Mont Louis*, 62 F. 2d 603, 605 (2d Cir. 1933) and cases collected; Gilmore & Black, *Op. Cit.*, p. 517, note 103 and cases cited]. The Court of Appeals also was not required to decide what portion of the monies paid to the Bank (which represented the total purchase price of the steel shipped) actually were freight monies. Respondent contends that no portion is so identifiable and that therefore no lien could ever exist.

Petitioner asserts (Petition, p. 8) that the foregoing rule is applicable only to bona fide holders in due course of negotiable bills of lading. That argument is not supportable. A shipowner has no lien upon frieghts which have been prepaid whether such payment has been made to the charterer, its assigns or creditors, or to any other third person [See: *Marine Traders, Inc. v. Seasons Navigation Corp., supra,* 422 F. 2d 804 at 806; *In re North Atlantic & Gulf Steamship Co., supra,* 204 F. Supp. 899 at 906; *Luckenbach Overseas Corp. v. Subfreights of S. S. Audrey J. Luckenbach,* 232 F. Supp. 572 at 577 (S.D.N.Y. 1963); *Schirmer Stev. Co. Ltd. v. Seaboard Corp.,* 306 F. 2d 188 (9th Cir. 1962); Gilmore & Black, *op. cit.,* p. 208; Stephens, *op. cit.,* p. 200].

Petitioner's oblique suggestion (Petition, p. 8) that the decision here conflicts with that in *The Solhaug,* 2 F. Supp. 294 (S.D.N.Y. 1931) is without merit. In *Solhaug* a shipowner sought to impose a lien on the unpaid portion of subfreights still held by a consignee of a sugar shipment. *Solhaug* did not involve, as does the case at bar, a shipowner's claim of lien upon freights previously paid to and in the possession of a third party. Moreover, several cases of the Second Circuit, cited above, are in accordance with the result reached here by the Ninth Circuit Court of Appeals.

Long accepted, well established principles of admiralty law were applied by the Court of Appeals in the case at bar. The decision below presents no conflict with prior decisions of this Court or other Circuits. Nor does the present case raise issues of such importance as to even arguably warrant review by this Court on certiorari.

II.

The Court of Appeals Decided No Important Question of Federal Law Warranting Certiorari. Review of the Jurisdiction Issue Would Be Hypothetical and Advisory. The Decision Below Created No Conflict in Its Determination of Jurisdiction.

A. The Jurisdictional Issue Is Illusory Since Petitioner Prevailed Thereon; Any Decision of This Court Would Be Advisory Only.

In an approach which is long on ingenuity but short on rationality, Petitioner proposes that this Court should grant certiorari on the basis of the Court of Appeals' decision on the jurisdictional issue (Petition, pp. 9-11). Since Petitioner prevailed on that issue in the Court of Appeals, its present argument is surprising, if not bewildering.

To understand the distortion it should be recalled that Petitioner argued below that absent a maritime lien, it had an equitable claim in the nature of a constructive trust. Respondent Bank, on the other hand, contended that the constructive trust claim was not within the admiralty jurisdiction of the Court, and that in any event the findings of the trial court did not support the imposition of such a trust.

The Court of Appeals held that the constructive trust claim was an independent equitable claim (rather than one incidental to admiralty jurisdiction). In so holding the Circuit Court's decision was in accordance with that of this Court in *Swift & Co. Packers v. Compania Columbiana Del Caribe S.A.*, 339 U.S. 684, 690 (1950) and its own prior decision in *Putnam v. Lower*, 236 F. 2d 561, 569 (9th Cir. 1956). The Court of Appeals went on, however, to *agree with Petitioner* that the District Court had jurisdiction over

Petitioner's equitable claim, basing such juridiction on two alternative grounds, *i.e.*, "pendent" jurisdiction and "diversity" jurisdiction. Thus, as the jurisdictional issue was finally resolved, Petitioner *prevailed* in its effort to have its equitable claim considered on its merits.

Since Petitioner's equitable claim was in fact considered and decided on its merits by the Court of Appeals, it is now irrelevant whether the Court did so under a theory of pendent or diversity jurisdiction rather than in admiralty. In either event, Petitioner prevailed on the jurisdictional issue and had a full hearing on the merits. The granting of certiorari to review the jurisdictional issue would be an entirely hypothetical, academic and advisory exercise by this Court—wholly inconsistent with this Court's settled practice [*e.g.*, *Alabama State Federation of Labor, et al. v. McAdory*, 325 U.S. 450, 461 (1945); *Trailmobile Co. v. Whirls*, 331 U.S. 40, 48 (1947)]. Petitioner having prevailed in inducing the court below to consider its equitable claim on the merits, the granting of certiorari would, in effect, grant appellate review of an issue to the party which was successful on that issue in the lower court—an exercise in which this Court has refused to indulge [*Public Service Commission v. Brashear Freight Lines, Inc.*, 306 U.S. 204, 206-07 (1939)].

B. The Decision Below Created No Conflict.

In holding that the claimed constructive trust was an independent equitable claim, beyond admiralty jurisdiction, the Court of Appeals' decision was in accord with *Swift & Co. Packers v. Compania Columbiana Del Caribe S.A.*, *supra*, 339 U.S. 684, 690 (1950) where this Court said: "Unquestionably a court of admiralty will not enforce an independent equitable claim merely

because it pertains to maritime property." The decision also conformed to the Ninth Circuit's prior decision in *Putnam v. Lower, supra,* 236 F. 2d 561, 569, as well as to other cases in which a court of admiralty has refused to entertain what is essentially an independent equitable claim [*e.g., The Eclipse,* 135 U.S. 599, 608 (1890); *Port Welcome Cruises, Inc. v. S.S. Bay Belle,* 215 F. Supp. 72, 84-85 (D.C. MD. 1963), *Aff'd Sub. Nom. Humble Oil & Refining Co. v. S.S. Bay Belle,* 324 F. 2d 954 (4th Cir. 1963); *F.D. Marchessini & Co. v. Pacific Marine Corp.,* 227 F. Supp. 17, 20 (S.D.N.Y. 1964); *Economu v. Bates,* 222 F. Supp. 988, 991-92 (S.D.N.Y. 1963)].

Petitioner's assertions (Petition, p. 10) that the judgment here conflicts with other decisions cannot be sustained. *Archawski v. Hanioti,* 350 U.S. 532, 536 (1956) was a claim for restitution and unjust enrichment where there had been failure of consideration in a contract of passage; the claim arose as "the result of the breach of a maritime contract". In *Archawski* this Court was not (as here) concerned with a claim sounding exclusively in equity, but rather with one arising within the admiralty. Similarly *Sword Line, Inc. v. United States,* 228 F. 2d 344 (2d Cir. 1955), Aff'd on rehearing 230 F. 2d 75 (1956), Aff'd 351 U.S. 976 (1956), involved a claim clearly maritime in nature; there the court passed on an overpayment of charter hire.[5]

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[5]Notwithstanding its colorful language, *Compania Anonima Venezolana De Navacione v. A. J. Perez Export Co.,* 303 F. 2d 692 (5th Cir. 1962)—cited at page 10 of the Petition—has no relevance here. The issue in *Perez* was not one of jurisdiction but simply whether a berth agent, as the subrogee of a carrier, was entitled to collect freight charges from a shipper where the shipper had previously paid a freight forwarder who in turn failed to pay the carrier or the agent.

The Court of Appeals correctly concluded that the constructive trust claim constituted a separate basis for recovery and was therefore an independent equitable claim beyond the admiralty jurisdiction. Therefore even had the court declined to exercise jurisdiction on other bases, certiorari would not be warranted. But such jurisdiction was exercised and the matter fully considered on the merits, and *a fortiori* certiorari should be denied.

C. The Imposition of a Constructive Trust Was Properly Denied.

Having decided the jurisdictional issue favorably to Petitioner, the Court of Appeals addressed itself to the merits of the constructive trust claim and held that "the district court's findings do not support imposition of a constructive trust for [Petitioner's] benefit" (Petition, Appendix A, p. 10). In so holding the Court of Appeals did not, as Petitioner now argues, assume the role of a trier of fact (Petition, p. 11); rather the Court of Appeals accepted the findings of the District Court, and held that those findings were insufficient, as a matter of law, to impose a trust upon one creditor in favor of another creditor.

Hornbook law dictates that a constructive trust may be imposed only where one acquires property to which he is not entitled by reason of fraud, accident, mistake, undue influence or the violation of an express trust or confidential relationship [Bogart, *Trusts & Trustees* (2d Ed. 1965) §§471-475; *Scott on Trusts* (3d Ed. 1967) Vol. V, §462.2; Restatement, *Restitution*, §160 and Comments; 89 C.J.S. *Trusts*, §139, pp. 1015-1024; California Civil Code §2224.] The findings of the District Court established none of the foregoing grounds for the imposition of a constructive trust.

Petitioner suggests (Petition, pp. 10-11) that the Court of Appeals' exercise of pendent or diversity jurisdiction interjected a choice of laws issue into the constructive trust claim which would not have been present had admiralty jurisdiction been exercised. The argument lacks both candor and merit. *First*, Petitioner itself argued the applicability of California law in urging the merits of its claim;[6] *Second*, California law fully accords with generally accepted principles of constructive trust.

The court below was confronted with two creditors, one of whom was paid and the other not. These circumstances do not create a constructive trust [*McKey v. Paradise*, 299 U.S. 119, 122-23 (1936); *Woodruff v. Coleman*, 98 A. 2d 22 (D.C. 1953); *Zirker v. Baber*, 161 Cal. App. 2d 355, 327 P. 2d 63 (1958); 1 Bogart, *Trusts & Trustees* (2d Ed. 1965), §19, p. 129].

Resolution of the merits of the constructive trust claim essentially involved the application of routine and established principles of law to an admitted set of facts concerning the claims of two creditors against the same debtor. The day has long passed when matters of this nature should burden this Court's calendar. No important question of Federal Law warrants the granting of certiorari.

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[6]The opinion of the Court of Appeals makes note of the fact that both sides argued the applicability of California substantive law to the merits of the constructive trust claim (Petition, Appendix A, p. 10). Petitioner cited both California statutory and decisional law in its brief before the Court of Appeals.

Conclusion.

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Dated: May 3, 1971.

Respectfully submitted,

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